



**July 6, 2005**

**Noteworthy:**

- [Frist Applauds Thompson's New Role, July 6, 2005](#)
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“Let's all understand one thing; it's the President who has this privilege of picking whoever is going to be on the Supreme Court. That's always been the case. That's always going to be the case. You know, there's nothing in the Constitution that says that he has to consult with members of the United States Senate, but it's a courtesy. He will. He has been. But the courtesy should go both ways, and that is that his nominee should be treated fairly by both Democrats and Republicans, and I intend to see that that happens.

**-Senator Hatch**, Fox News, 7/6/05

**Excerpts from past Supreme Court nomination hearings regarding proper scope of questioning.....**

“[I]t is our responsibility as members of the [Judiciary] Committee ... in advising and consenting, that we are challenged to ascertain the qualifications and the training and the experience and the judgment of a nominee, and that it is not our responsibility to test out the nominee's particular philosophy, whether we agree or disagree ...” **Senator Kennedy**, Committee On The Judiciary, U.S. Senate, Hearing, 7/19/67

**Now:**

“Every question is a legitimate question, period. ... It is our obligation to ask the questions of the nominees about their judicial philosophies ... To simply look at the résumé and say, ‘You're fine,’ I don't buy that.” **Senator Schumer**, “Schumer Heats Up Supreme Grill,” *New York Post*, 7/6/05

**Frist Applauds Thompson's New Role  
7/06/2005**

WASHINGTON, D.C. – U.S. Senate Majority Leader Bill Frist, M.D. (R-TN) today applauded the White House's announcement indicating that former Tennessee Senator Fred Thompson will play an important advisory role in the Supreme Court nomination process:

“I was honored to serve the state of Tennessee alongside Senator Fred Thompson. He has a profound understanding of Judiciary matters and is best

known for his no-nonsense style. Fred is a well-respected leader admired on both sides of the political aisle as someone who is fair-minded and straight-forward. He is experienced in the ways of Washington and will undoubtedly provide valuable insight and counsel throughout the confirmation process. I believe his advice and guidance will help ensure that this nomination process is fair and consistent with previous Supreme Court nominations. Tennesseans are certainly proud of Fred Thompson's service. And I believe whoever the President nominates will be well-served by Fred Thompson."

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**After O'Connor**  
**Wall Street Journal**  
**July 5, 2005; Page A20**

When President Reagan nominated Sandra Day O'Connor for the Supreme Court in 1981, former Texas Congresswoman Barbara Jordan, a Democrat, declared, "I don't know the lady, but if she's a good lawyer and believes in the Constitution, she'll be all right."

And so Justice O'Connor was confirmed unanimously as the 102nd Justice of the U.S. Supreme Court and the first woman to sit on the highest court in the land. Twenty-four years later, her retirement has set the judicial-appointment process in motion again for the first time in 11 years. On Friday President Bush called for a "dignified" confirmation process, meaning no repeat of the attempts to annihilate Robert Bork and Clarence Thomas. By way of contrast, Barbara Jordan's comment seems like a relic of a more gracious past.

Hours after Justice O'Connor's announcement, MoveOn.org was predicting a nominee who is "an extremist who will undermine the rights of individuals and families." Ted Kennedy was already ratcheting up his end-of-days rhetoric. Mr. Bush shouldn't let these threats deter him from choosing someone who will move the Court in the direction that voters have endorsed in two Presidential elections in a row.

Justice O'Connor is being hailed as the Court's "swing" Justice, but her legacy is more complicated. She has been a conservative on property rights and federalism, most recently in her *Kelo* dissent, where she took vigorous issue with the Court's extension of government's eminent domain power to include the taking of private property for private economic development. Replacing her with a "moderate" could actually mean a more liberal court on those issues.

Where she drifted left over the years -- and where her written opinions often sowed confusion -- was on social issues, notably church-state and racial matters. She focused more on the facts of a particular case than on determining bright-line rules that citizens could understand and legislatures could follow in the future. Before the *Ten Commandments* decision came down last month, Beltway wags joked that Justice O'Connor would find five of the 10 unconstitutional.

Her muddled 2003 rulings on racial preferences at the University of Michigan is a case in point. On one hand, she found a "compelling governmental interest" in ensuring diversity, but she also expressed the hope that 25 years hence it would no longer be needed. Even here, however, she opposed the most blatant race-based schemes, which would put her to the right of Attorney General Alberto Gonzales, judging from what we know about his role in influencing the government brief in the Michigan cases.

She also moved left on abortion over the years, but her departure does not put *Roe v. Wade* in jeopardy, notwithstanding claims on the left. Justice O'Connor provided the fifth vote in *Casey*, reaffirming *Roe* and a woman's right to abortion, but Ruth Bader Ginsburg has since joined the Court as the sixth vote in favor of *Roe*. On the other hand, the *Carhart* partial-birth abortion case -- a 5-4 decision overturning Nebraska's ban -- could well be overturned. But then two-thirds of Americans support laws banning that procedure, and it is the Court's extremism that has blocked just about any regulation of abortion even up to the time of birth.

Mr. Bush has had five years to evaluate possible nominees to the Supreme Court and there are many highly qualified candidates -- male and female, on the appeals courts and elsewhere. Liberals who are demanding that he replace Justice O'Connor with a non-conservative are ignoring the recent history of Supreme Court nominations. When President Clinton named liberal Ruth Bader Ginsburg to replace Byron White, who had voted against *Roe*, Republicans didn't object even though that clearly moved the Court to the left on abortion and most other issues.

Mr. Bush has often said he'd like to appoint a Hispanic to the Court, and there are several fine candidates, including Miguel Estrada, whose nomination to the D.C. Circuit Court of Appeals was filibustered during Mr. Bush's first Administration. As a war President, Mr. Bush will also want someone who has a healthy respect for executive power in fighting terrorism -- such as the Fourth Circuit's J. Harvie Wilkinson. This argues against Mr. Gonzales who, as former White House counsel and now head of the Justice Department, would have to recuse himself from most if not all of the war-on-terror cases. A series of 4-4 rulings would be bad for the country on what promises to be a fundamental legal debate in the coming years and could be a matter of national survival.

Any nominee will provide a test of the recent Senate deal barring a filibuster except in "extraordinary circumstances." If words mean anything, they ought to allow a filibuster only in the case of something truly unusual, such as an ethical scandal. They shouldn't include judicial philosophy, although the left is already trying to redefine them that way. The only time the filibuster has been used against a Supreme Court nominee was LBJ's choice of Abe Fortas, who faced corruption charges, and even then it was used mainly to gauge Senate support.

Justice O'Connor served 24 terms, and the average tenure for recent Justices is 19.5 years, or five Presidential terms, so the stakes are enormous. For liberals, the courts have become the preferred way to win policy victories now that Americans are consistently rejecting their agenda at the ballot box. Unlike Barbara Jordan and her colleagues 25

years ago, modern liberals are unlikely to be satisfied with a nominee who is a "good lawyer and believes in the Constitution."

But the only way to stop "borking" as a political strategy is to defy and defeat it. Mr. Bush told voters in 2000 and 2004 that he would nominate Justices in the mold of Antonin Scalia and Clarence Thomas. He owes it to the country, and his most loyal supporters, to keep that promise.